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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000534-001 DT 10/27/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
H. Beal
Deputy

STATE OF ARIZONA SETH W PETERSON

v.

RANDI LEE BRANDFASS (001) DAVID BURNELL SMITH

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M–0751–TR–2010–016239.

Defendant-Appellant Randi Lee Brandfass (Defendant) was convicted in Scottsdale Municipal Court of driving under the extreme influence. Defendant contends the sentence the trial court imposed on her denied her equal protection because it ordered her to serve 60 days in jail, rather than 15 days in jail, before being eligible for home detention. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On May 24, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); reckless driving, A.R.S. § 28–693(A); speed not reasonable and prudent, A.R.S. § 28–701(A); failure to control speed to avoid a collision, A.R.S. § 28–701(A); driving on a suspended license, A.R.S. § 28–3473(A); failure to have vehicle registration in vehicle, A.R.S. § 28–2158(C); no proof of insurance, A.R.S. § 28–4135(C); and vehicle equipment not in good working order, A.R.S. § 28–981(1). On June 11, 2010, the State filed a Complaint charging Defendant with driving under the extreme influence, A.R.S. § 28–1382(A)(1) & (A)(2).

At the trial, Ryan Brown testified he and Jessica Martin were driving east on Shea Boulevard on May 24, 2010, at 45 m.p.h. when a black SUV drove past them at a high rate of speed. (R.T. of Nov. 9, 2010, at 10–11.) He was so concerned with the way the vehicle was being driven he told Jessica to call 9-1-1. (*Id*. at 11–12.) He increased the speed of his vehicle so they could read the license plate on the SUV, but it was driving too fast for them to get close enough. (*Id*. at 13.) As they approached the intersection at Hayden Road, he saw sparks and saw a light pole go down. (*Id*.) When the got to the intersection, he saw the SUV on top of a large boulder on the side of a ditch, and saw another vehicle smashed between a tree and the light pole. (*Id*. at 13–14.)

Jessica Martin testified she and Ryan Brown were driving east on Shea Boulevard toward Hayden Road on May 24, 2010, at 45 m.p.h. when a black SUV Escalade drove past them at a high rate of speed. (R.T. of Nov. 9, 2010, at 17–18.) The SUV was traveling so fast it scared them, so she started to call 9-1-1. (*Id*. at 19.) As they approached the intersection at Hayden Road, she saw the SUV veer toward the left, and then saw a bunch of sparks and the light pole go down. (*Id*. at 19–20.) When they got to the intersection, she saw another vehicle with the back end smashed in and the vehicle pushed into a tree. (*Id*. at 20.) She saw the SUV in a grassy ditch area off the side of the road. (*Id*. at 21.)

Roger Anduaga-Arias testified he was driving near Shea Boulevard and Hayden Road on May 24, 2010. (R.T. of Nov. 9, 2010, at 23–24.) He heard a loud bang, and when he looked at the intersection, he saw a vehicle smashed against a telephone pole, and saw a SUV in a ditch off to the right side of the road. (*Id*. at 24–25.) The smaller, compact vehicle was smashed in the rear almost up to the passenger seat. (*Id*. at 25.) He went over to the SUV and saw the rear axle was on top of a large boulder with the back wheels at least a foot off the ground. (*Id*. at 26.) The driver, whom he identified as Defendant, was moving the SUV forward and reverse apparently trying to dislodge it from the boulder. (*Id*. at 27.) He told Defendant to turn off the ignition, which she did. (*Id*. at 28.) He told her he had called an ambulance, and she said, "I don't need no stinking patient." (*Id*. at 28–29.) When Defendant got out of the SUV, she was stumbling, and then she tried to run off. (*Id*. at 29.) Mr. Anduaga-Arias ran after her and caught her, and brought her back to the SUV. (*Id*.) A woman police officer then arrived and took Defendant into custody. (*Id*. at 30.)

Lauren Marie Gibeault testified she was a passenger in a Nissan Altima driven by her boyfriend Matt on May 24, 2010. (R.T. of Nov. 9, 2010, at 33–34.) They were driving east on Shea Boulevard and Hayden Road when their vehicle was hit by another vehicle. (*Id*. at 34–35.) As a result of the collision, she had a broken thumb, a concussion, and minor brain damage. (*Id*. at 35.)

Matthew Schellenberger testified he was driving east on Shea Boulevard and Hayden Road on May 24, 2010, when he was involved in a collision. (R.T. of Nov. 9, 2010, at 38–39.) He did not remember anything about the collision, but when he saw his vehicle the next day, he saw the trunk was shoved all the way passed the back seat and into the front seats, and there were tire marks where the back seat would have been. (*Id*. at 39–40.) As a result, his vehicle was totaled. (*Id*. at 40.)

Officer Michelle Mitchell testified she received a call at 10:09 p.m. on May 24, 2010, of a bad collision involving a vehicle that had been traveling at 90 m.p.h. (R.T. of Nov. 9, 2010, at 43.) When she got to the area of Shea Boulevard and Hayden Road, she saw two vehicles severely damaged. (*Id*.) She saw a woman running east, so she parked her vehicle and ran after the woman, whom she identified as Defendant. (*Id*. at 44.) A man had grabbed Defendant's arm, so Officer Mitchell grabbed Defendant's other arm. (*Id*. at 44, 65.) Officer Mitchell said Defen-

dant showed numerous signs of intoxication. (*Id*. at 45–46, 48–52.) Defendant said the black SUV Escalade was her vehicle and she had been driving it. (*Id*. at 46.) Officer Mitchell then arrested Defendant for driving under the influence, and fire department personnel took her to the hospital. (*Id*. at 52–53, 65.) At 11:15 p.m., Defendant's blood was drawn for medical purposes, and Officer Mitchell obtained a portion of that blood draw. (*Id*. at 53–55, 65–66.) The subsequent test of Defendant's blood sample showed she had a BAC of 0.241. (State's Exhibit #6.)

After the State rested, Defendant's attorney made a motion for judgment of acquittal, which the trial court denied for all charges except Count 10, vehicle equipment not in good working order. (R.T. of Nov. 9, 2010, at 87–88.) The trial court found Defendant guilty of Counts 1, 2, 11, and 12, the DUI charges and extreme DUI charges, Count 6, the reckless driving charge, and Count 9, the suspended license charge, and not guilty of Count 5, the speeding charge. (*Id*. at 96–97.) The trial court found Defendant responsible for the civil traffic charges in Counts 7 and 8, and not responsible for Count 9. (*Id*. at 97.)

The trial court held sentencing in this matter, which the transcript shows as December 6, 2010, while the trial court's docket sheet shows as December 16, 2010. Lauren Gibeault addressed the trial court and said Defendant's decision to drink excessively and then drive change forever her life and the life of Matthew Schellenberger. (R.T. of Dec. 6, 2010, at 102.) She noted Defendant had three times the alcohol limit, was driving a large Cadillac SUV almost twice the speed limit, and was driving on a suspended license. (*Id*. at 103, 104.) She noted Defendant engaged in the same unlawful driving behavior on July 22, 2010, just under 2 months later. (*Id*. at 104.) The prosecutor noted Defendant had been arrested on December 2, 2010, for driving on a suspended driver's license. (*Id*. at 108.)

Defendant's attorney noted the July 22, 2010, DUI charged had been dismissed because the investigation officer was no longer with the police force. (R.T. of Dec. 6, 2010, at 109–10.) He said Defendant was going through a divorce and she had cancer. (*Id*. at 111.)

Defendant apologized to the victims for what she did to them. (R.T. of Dec. 6, 2010, at 112.) She discussed her pending divorce and her cancer treatments. (*Id*. at 111.) She then explained away the July 22 DUI charge and the December 2 driving on a suspended license charge. (*Id*. at 113.) She said she thought she would "have to do this alcohol thing." (*Id*. at 113–14.)

Defendant's attorney noted the minimum sentence was 45 days in jail, and recommended the trial court impose the 45 day minimum with 15 days served in jail and the remainder on house arrest. (R.T. of Dec. 6, 2010, at 114–16.) The prosecutor had asked the trial court to impose the maximum 6 months in jail. (*Id*. at 108.) The trial court then placed Defendant on 2 years of unsupervised probation. (*Id*. at 117.) The trial court found this was a very serious accident. (*Id*. at 117–18.) It ordered 6 months of jail, with 60 days served in jail and the remaining 120 days on home detention, and work release eligibility after 48 hours in jail. (*Id*. at 118.) On December 29, 2010, Defendant filed a timely notice of appeal.

On May 24, 2011, the trial court revisited the sentence. It dismissed the BAC over 0.08 and the BAC over 0.15 as lesser-included offenses of the BAC over 0.20 charge, and entered an new judgment. (C.D. of May 11, 2011, at 0:40 to 1:01; 4:50.) When Defendant's attorney asked the trial court to change the sentence that had been imposed, the trial court said it could not do so. (*Id*. at 6:30.) It then discussed the sentences with the attorneys to make sure the new judgment was correct. (*Id*. at 7:15 to 7:30.)

On June 2, 2011, Defendant's attorney filed a Motion To Reconsider Sentence asking the trial court to order only 15 days of jail and the remainder as home arrest. On June 3, 2011, the trial court denied that motion. On June 14, 2011, Defendant filed another notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID DEFENDANT PROPERLY PRESENT TO THE TRIAL COURT HER EQUAL PROTECTION ARGUMENT.

Defendant contends the trial court's order that she serve 60 days in jail before she is eligible for home arrest denies her equal protection. Absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron,* 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff,* 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz,* 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). It is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact intensive one. *State v. Rogers,* 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996) (court of appeals offered alternative holding that, even if investigatory stop was illegal, defendant abandoned baggy after stop and during chase; inasmuch as state did not raise issue of abandonment at trial and no factual record was made on it, it would be inappropriate for appellate court to base ruling on that argument); *State v. West,* 176 Ariz. 432, 440–41, 862 P.2d 192, 200–01 (1993) (whether police department had policy on inventory searches and followed it was fact-intensive question, because defendant did not raise this issue at trial, appellate court was not required to consider it on appeal).

In the present case, at neither the sentencing held December 16, 2010, nor when the trial court revisited the sentence on May 24, 2011, did Defendant's attorney raise a claim of equal protection. In Defendant's Motion for Reconsideration of Sentence filed June 2, 2011, Defendant states "the standard sentence for DUI offenders had been 15 days in jail with the remainder of a DUI sentence served in home detention." (Motion, at 2, ll. 6–7.) She did not, however, make any argument that not getting the 15 days in jail followed by home detention would be a denial of equal protection. Because Defendant did not make an equal protection argument to the trial court and because she is thus entitled to relief only upon a showing of fundamental error, Defendant is required to show both (1) error existed and (2) she was prejudiced by the error.

Defendant has failed to show any error. The Equal Protection Clause applies only when the matter involved gives the person some sort of protection. *Wigglesworth v. Mauldin*, 195 Ariz. 432, 990 P.2d 26, ¶¶ 19–24 (Ct. App. 1999) (whether to grant commutation of sentence based on recommendation of Arizona Board of Executive Clemency is totally within Governor's discretion, thus inmate had no equal protection claim based on Governor's commutation of sentences of other inmates). In *Wigglesworth*, the Arizona Board of Executive Clemency recommended the Governor commute Wigglesworth's sentence, but the governor declined to do so. Wigglesworth claimed this denied him equal protection, but the court disagreed. It first held he had no liberty interest in the reduction of his sentence, and that he was not a member of a suspect class. *Wigglesworth* at ¶ 21. It then held the Governor had discretion to grant a commutation and thus could dispose of each case as he wished. *Wigglesworth* at ¶ 22. Finally, it held the Governor's actions in granting commutations to other inmates gave Wigglesworth no right to a commutation:

> Similarly, Governor Symington's agreement to commute the sentences of others convicted of crimes similar to Wigglesworth's generates for him neither constitutional protections nor equal protection rights. Under our present law an Arizona governor's discretion to act on the Board's recommendations remains unfettered, subjective, arbitrary, and a matter of grace. We conclude that Wigglesworth's claim was properly dismissed for failure to state a claim.

Wigglesworth at ¶ 24.

In the present case, Defendant has failed to show error for several reasons. First, she has failed to show she is a member of a suspect class. Second, she has failed to show she has a constitutionally-protected liberty interest in receiving only 15 days incarcerated in jail as opposed to 60 days incarcerated in jail. And third, she has failed to show how sentencing other DUI offenders to 15 days incarcerated in jail automatically gives her a right to similar treatment.

Moreover, even if Defendant could show equal protections apply to her at sentencing, she has failed to show any error or prejudice. As noted above, it is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact intensive one. She makes the statement that other DUI offenders receive only 15 days of jail incarceration, but she give no indication whether those who receive that sentence are convicted of DUI with a BAC of 0.08 or more, DUI with a BAC of 0.15 or more, or DUI with a BAC of 0.20 or more. Further, Defendant's driving while under the influence resulted in a violent collision that caused minor brain damage to one of the victims. (R.T. of Nov. 9, 2010, at 35.) Because the trial court has discretion in sentencing and is not required to state any reasons for imposing a chosen sentence, Defendant has failed to show any error or prejudice.

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III. CONCLUSION.

Based on the foregoing, this Court concludes Defendant has failed to state a claim of denial of equal protection.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 102720111330